Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

IN RE: AEROQUIP CORPORATION, CHEVRON, U.S.A., PARKER-HANNIFIN CORPORATION, SEQUENTIA, INC., AMOCO OIL COMPANY, BASF CORPORATION, ICI AMERICAS, INC., ICI ACRYLICS, INC., FRIGOSCANDIA FOOD PROCESS SYSTEMS, INC., STEIN, INC., DANA CORPORATION, W.W. GRAINGER, INC., HONEYWELL, INC., CHEMED CORP., GATES RUBBER COMPANY, EATON CORPORATION, SQUARE D COMPANY, CRANE COMPANY, KEMLITE COMPANY, BRUNSWICK CORPORATION, VAPOR CORPORATION, ECLIPSE INCORPORATED, SOUTHEAST COOLER CORPORATION, WORMALD FIRE SYSTEMS, INC., and MOBIL OIL CORPORATION,

Petitioners.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Fourth Circuit Court of Appeals err, by refusing to issue a Writ of Mandamus, in allowing the United States District Court for the Middle District of North Carolina to overrule improperly and without authority prior findings and a decision issued in this case by the United States District Court for the Eastern District of Texas?

Does a United States District Court have the power to remand a case on equitable grounds pursuant to 28 U.S.C. § 1452(b) if it was not the court to which the case was initially removed pursuant to 28 U.S.C. § 1452?

PARTIES TO THE MANDAMUS PETITION PROCEEDING IN THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The parties who pursued the Petition for Mandamus in the Court of Appeals for the Fourth Circuit (the court whose decision is sought to be reviewed) are listed below, along with their parent companies and nonwholly owned subsidiaries (publicly held):

Aeroquip Corporation—parent company: Trinova Corporation; no subsidiary

Amoco Oil Company—parent company: Amoco Corporation; no subsidiary

BASF Corporation—parent company: BASF A.G.; no subsidiary

Brunswick Corporation—parent company: Old Orchard Industrial Corp.; no subsidiary

Chemed Corporation—Dubois Chemicals, formerly a division of Chemed; Dubois Chemicals was acquired by Diversey Corporation; parent company of Diversey Corporation: The Molson Companies, Ltd.; no subsidiary

Chevron, U.S.A.—parent company: Chevron Corporation; no subsidiary

Crane Company—no parent company or subsidiary

Dana Corporation—no parent company; subsidiaries: Albarus, S.A. Industrial E Comercio; Albarus Sistemas Hidraulicos, Ltda.; E. Daneri I.C.S.A.; Hayes-Dana, Inc.; Industrial de Eyes y Transmissiones, S.A. (Transejes); Mahindra & Mahindra; Perfect Circle Victor, Ltd.; Rosetta Technologies, Inc.; Reinz Talbros, Ltd.; Super Circle Gasket, Ltd.; Spicer, S.A.; Victor Gaskets de Colombia, S.A.

Eaton Corporation—no parent company or subsidiary

Eclipse Incorporated—no parent company or subsidiary

Frigoscandia Food Process Systems, Inc.—parent company: Frigoscandia, Inc.; no subsidiary

Gates Rubber Company—no parent company or subsidiary

Honeywell, Inc.—no parent company or subsidiary

ICI Acrylics, Inc.—parent company: Imperial Chemical Industries, PLC; no subsidiary

ICI Americas, Inc.—parent company: Imperial Chemical Industries, PLC; no subsidiary

Kemlite Company—parent company: Crane Co.; no subsidiary

Mobil Oil Corporation—parent company: Mobil Corporation; no subsidiary

Olympic Oil Company—no parent company or subsidiary

Parker-Hannifin Corporation—no parent company or subsidiary

Sequentia, Inc.—no parent company or subsidiary

Southeast Cooler Corporation—no parent company or subsidiary

Square D Company—no parent company or subsidiary

Stein, Inc.—parent company: Frigoscandia, Inc.; no subsidiary

Superior Door Company—no parent company or subsidiary

Vapor Corporation—now known as Old Orchard Industrial Corp.; no parent company or subsidiary

W.W. Grainger, Inc.—no parent company or subsidiary

Wormald Fire Systems, Inc.—proper name: Wormald U.S. Inc.; parent company: Tyco International, Inc.; no subsidiary

The names of the persons and companies who were listed in the caption of Plaintiffs' Complaint initially filed in the Texas state court are set out at pp. 22a-27a of the Appendix.

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STATEMENT OF BASIS OF JURISDICTION

Date of Order sought to be reviewed (*i.e.*, the Fourth Circuit's Order denying petitioners' Petition for Writ of Mandamus): August 2, 1995.

Date of the Fourth Circuit's denial of petitioners' Petition for Rehearing: September 12, 1995.

This Court has jurisdiction to review the order in question by virtue of 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

28 U.S.C. § 157. Procedures

> (b)(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

> (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.
>
> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

STATEMENT OF THE CASE

On September 3, 1991, a fire at the Imperial Food Products, Inc. ("Imperial") plant in Hamlet, North Carolina (the "Hamlet Fire") took the lives of 25 employees of

Imperial and injured many others. Representatives of the decedents and injured parties filed a multiplicity of lawsuits against Imperial in North Carolina, the state where the fire occurred and the injuries were sustained. As a result of that litigation and actions taken by the State of North Carolina, Imperial was forced into involuntary bankruptcy in the bankruptcy court in North Carolina. Eventually, the personal injury and wrongful death claims then pending in North Carolina were settled. That settlement was overseen by the bankruptcy court and the United States District Court for the Middle District of North Carolina. The administration of the Imperial bankruptcy continues in North Carolina, and the bankruptcy trustee for Imperial is still engaged in adversary proceedings in the bankruptcy court, including two proceedings against several Petitioners based on the same theories raised by Plaintiffs in this case.

On July 23, 1993, almost 200 plaintiffs instituted this case—a products liability action claiming wrongful death, personal injury, and other torts against almost 50 corporations whose products were allegedly present at the Hamlet Fire in North Carolina. *See* Appendix pp. 22a-27a (list of parties on Complaint). However, this action was not initiated in North Carolina, even though most of the Plaintiffs are North Carolina residents or the personal representatives of North Carolina decedents' estates. Instead, Plaintiffs instituted the action in a Texas state court.[1]

On August 24, 1993, the entire case was removed by Defendant PNC Bank pursuant to 28 U.S.C. § 1452(a) to the Bankruptcy Court for the Eastern District of Texas, Beaumont Division.[2] Plaintiffs then filed a motion for

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[1] Plaintiffs filed their action in a state whose law at the time did not recognize nor apply the principle of *forum non conveniens*, and hence the unfairness of Plaintiffs' forum shopping could not be challenged in the state court on that ground.

[2] The court of first instance possessed federal subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1334.

remand with the bankruptcy court in Texas. Plaintiffs' supporting memorandum requested a remand to Texas state court on equitable grounds pursuant to 28 U.S.C. § 1452(b). The Defendants joined issue on the question of equitable remand by memorandum of PNC Bank in support of its answer to the Plaintiffs' motion for remand dated September 29, 1993, and by responsive pleading of the remaining Defendants detailing the factors to be considered by the court in determining the issue of equitable remand under the Bankruptcy Act. Thereafter, periodic supplemental briefs, memoranda, reports and affidavits were filed over the course of ten months in the bankruptcy court in Texas.[3]

Paralleling the Plaintiffs' motion for remand, certain Defendants moved for dismissal of the action for lack of personal jurisdiction or, in the alternative, for transfer of the action to the United States District Court for the Middle District of North Carolina ("North Carolina District Court"). In support of the motions for transfer, the Defendants demonstrated that the vast majority of the Plaintiffs were residents of North Carolina or adjacent areas of South Carolina. Moreover, the center of gravity as determined by site of the fire, relevant witnesses, facts, documents, discovery materials and parties is located in North Carolina.

On July 11, 1994, United States Bankruptcy Judge Donald R. Sharp issued a report and recommendation that the federal district court, rather than the bankruptcy court, was vested with subject matter jurisdiction over the removed case. *See* Report and Recommendation to District Court (Bankr. E.D. Tex. July 11, 1994) (Appendix pp. 10a-15a). Judge Sharp recommended transfer of the

[3] The Texas bankruptcy and federal district courts had the benefit of the supporting brief of the Plaintiffs (31 pages), PNC's response (12 pages) and supporting brief (47 pages), Defendants' response and brief (17 pages) and numerous multi-page filings.

case to the North Carolina District Court for a determination as to the district within North Carolina in which the case should be tried. *Id.* (Appendix p. 15a). The report and recommendation of Judge Sharp was then subject to critical review and comment by all parties. The Plaintiffs filed an objection to the bankruptcy judge's report and recommendation. Plaintiffs raised in this objection arguments on jurisdiction and equitable remand under 28 U.S.C. § 1452(b).

After considering Plaintiffs' motion to remand and Defendants' motion to transfer and the numerous supporting legal memoranda, United States District Judge Howell Cobb adopted on August 5, 1994, the recommendations of Judge Sharp as his findings of fact, *see* Order of Withdrawal of Reference (E.D. Tex. Aug. 5, 1994) (Appendix pp. 16a-17a), and in a separate order, Judge Cobb transferred the case to the North Carolina District Court. Order of Transfer (E.D. Tex. Aug. 5, 1994) (Appendix pp. 18a-19a). Judge Cobb specifically recognized a number of equitable grounds for trying the case in North Carolina, including that the operative facts, parties, witnesses, and evidence are located in North Carolina. Judge Cobb specifically found that "the interests of justice require the transfer of this case to the District where it belongs." *Id.* (Appendix p. 19a). Judge Cobb's transfer order clearly stated that he was transferring the case to the Middle District of North Carolina for a determination under 28 U.S.C. § 157 as to where the case shall be tried. *Id.* Remanding the case to a state court in Texas was not one of the options provided.

Despite the clear instruction from Judge Cobb, and contrary to the previous findings and Order of Judge Cobb, the North Carolina District Court (Tilley, J.) on June 26, 1995, ruled that remand to a Texas state court was warranted under 28 U.S.C. § 1452(b). *See* Memorandum Opinion (M.D.N.C. June 26, 1995) (Appendix pp. 2a-8a).

Petitioners filed a Petition seeking a Writ of Mandamus from the Fourth Circuit directing the North Carolina District Court to vacate its order remanding the case on the grounds that it had no power to remand under 28 U.S.C. § 1452(b), that it exceeded its statutorily defined power and usurped judicial authority of a sister court, and that it disregarded law of the case implicit in the prior decision of a sister court.

A three-judge panel of the United States Court of Appeals for the Fourth Circuit denied the Petition for Mandamus with no explanation for its decision. *See* Order Denying Petition for Writ of Mandamus (4th Cir. Aug. 2, 1995) (Appendix p. 1a). Petitioners filed a petition for rehearing with suggestion for rehearing in banc, but that petition was denied. *See* Order Denying Petition for Rehearing and Rehearing in Banc (4th Cir. Sept. 12, 1995) (Appendix pp. 20a-21a). A member of the United States Court of Appeals for the Fourth Circuit requested a poll on the suggestion for rehearing in banc. Two judges voted to rehear the case in banc, the majority (six) voted against. *Id.* (Appendix p. 21a).

ARGUMENT

In denying petitioners' Petition for Writ of Mandamus, the Fourth Circuit Court of Appeals has sanctioned the departure of a United States district court from the accepted and usual course of judicial proceedings to such a degree as to call for an exercise of this Court's power of supervision. *See* Supreme Court Rule 10(a). Specifically, when the North Carolina District Court ordered remand of this case to the Texas state court, it (1) overruled the prior findings and a decision of a sister court, and (2) ignored the plain language of a federal statute. The Fourth Circuit improperly denied petitioners' request for mandamus relief to correct this clear violation of judicial proceeding and statutory authority. In so doing, the Fourth Circuit sanctioned the action of the North Carolina District Court in violation of important rules of judicial proceeding which this Court strives to safeguard.

I. THE NORTH CAROLINA DISTRICT COURT IMPROPERLY AND WITHOUT AUTHORITY OVERRULED THE TEXAS DISTRICT COURT'S IMPLICIT DENIAL OF REMAND AND EXPRESS FINDING THAT EQUITABLE FACTORS DISFAVORED REMAND TO THE TEXAS STATE COURT

In this case, one federal court has overruled the prior findings and a decision of a sister court. This is a clear violation of judicial proceeding that has been the subject of recent concern to this Court. *See Celotex Corp. v. Edwards*, —— U.S. ——, 115 S. Ct. 1493 (1995).

In *Celotex*, this Court stated:

> We have made clear that '[i]t is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected.'

Celotex, 115 S. Ct. at 1501 (citing *Walker v. Birmingham*, 388 U.S. 307, 314 (1967) (quoting *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922)).[4] This Court noted that permitting litigants to stray from this edict cannot be done without "*seriously undercutting the orderly process of law.*" *Celotex*, 115 S. Ct. at 1501 (emphasis supplied). This case should be reviewed to enable this Court to ensure that circuit courts of appeal do not sanction a course of proceeding by lower courts that could undercut the orderly process of law. Respect for the findings and decisions of courts of coordinate jurisdiction is

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[4] The dissent in *Celotex* focussed on a distinction it drew between the ruling of an Article III judge versus the ruling of a non-Article III judge, and a difference in weight to be afforded each of the two rulings. In this case, a non-Article III judge made a recommendation. However, an Article III judge actually entered the Order transferring this case, which Order established "law of the case" in this action.

vital to principles of comity and the orderly litigation of cases which pass through such courts of coordinate jurisdiction. When the North Carolina District Court ordered this case remanded to Texas State court, it violated this important rule of judicial proceeding. When the Fourth Circuit failed to grant mandamus relief to correct this violation, it sanctioned that improper judicial action of the district court and failed to uphold the important rules of judicial proceeding promoted by this court in *Celotex*.

To reach the North Carolina District Court, this case was transferred from the United States District Court for the Eastern District of Texas ("Texas District Court"). In accordance with *Celotex*, all orders entered by the Texas District Court were to be respected by the coordinate transferee court.

The Texas District Court, prior to ordering a transfer, had before it plaintiffs' motion for remand and numerous briefs addressing the equitable factors that favored—or disfavored—remand to Texas state court. Judge Cobb did *not* defer ruling on the motion for remand. Indeed, he was the only judge with authority to order a remand pursuant to 28 U.S.C. § 1452(b).[5]

In cases where motions to remand are filed during the pendency of a motion to transfer, courts routinely decide the remand first as it may render the issues raised by the motion to transfer moot or tangential. *See Williams v. Shell Oil Co.*, 169 B.R. 684, 694 n.9 (S.D. Cal. 1994). Thus, it is fair to infer that Judge Cobb did not reach the transfer issue until after rejecting the arguments supporting remand under § 1452(b). To reach any other conclusion requires a finding that Judge Cobb either inadvertently or, worse, deliberately left a significant issue undecided when

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[5] Section 1452(b) provides authority to remand a case on equitable grounds only to the court to which a case is removed. No other court is vested with that authority. *See infra* at 11-14.

he was the only judge with the authority to decide the issue.

In ordering the transfer, Judge Cobb made a finding that "the interests of justice require[d] the transfer" of this case to North Carolina, the "District where it belongs." Order of Transfer (E.D. Tex. Aug. 5, 1994) (Appendix p. 19a). Judge Cobb cited 28 U.S.C. § 157 which provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

Order of Transfer (Appendix p. 18a). Judge Cobb then noted: "Because the bankruptcy case was filed in the Middle District of North Carolina, that court should determine where the claim should be tried." *Id.* (Appendix pp. 18a-19a). Judge Cobb's order thus provided the transferee court with only two choices for where this case could be tried, and asked the transferee court to choose between them.

By transferring this case to North Carolina, the Texas District Court implicitly denied Plaintiffs' motion for remand. If the court had thought remand to Texas state court was proper, it would not have sent the case to North Carolina "where it belongs" for a district court there to decide if it should be tried in the district court where the claim arose or in the district court where the bankruptcy case is pending—both districts being located in North Carolina.

Further, all equitable considerations favoring—or disfavoring—remand to the Texas state court were placed squarely before Judge Cobb and were briefed at length by the parties while this case was pending in the Texas federal courts. Extensive legal arguments were presented

on these issues by the parties. Ultimately, Judge Cobb found that:

> [a]ll operative facts took place in North Carolina. Consequently, most, if not all, parties, witnesses, and evidence are located in North Carolina. Furthermore, the bankruptcy case was filed in the Middle District of North Carolina. Finally, the only apparent connection between the case and the Eastern District of Texas is the residence of one of the plaintiffs' attorneys.

Id. (Appendix p. 19a). Thus, Judge Cobb found that equitable factors favored trial in North Carolina and disfavored remand to Texas state court, a finding in direct conflict with the North Carolina District Court's subsequent order remanding the case to Texas on equitable grounds.

When the North Carolina District Court ignored the ruling of the Texas District Court and decided that the case did not belong in North Carolina and should be returned to Texas, it effectively overruled the existing findings and decision of the District Court in Texas. A North Carolina District Court judge does not have any appellate or supervisory role according it the right to review the decisions of a coequal federal judge. *See Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 168 (3d Cir. 1982) (judges of coordinate jurisdictions sitting in the same case should not overrule the decisions of each other). A collateral attack by a district court in the Fourth Circuit on existing orders of a district court in the Fifth Circuit cannot be permitted.

The transfer order of the Texas District Court, with its underlying predicate rejection of the motion to remand, constitutes the "law of the case." " '[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent states in the same case.' " *Christianson v. Colt Industries Operating Corp.*,

486 U.S. 800, 816 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). It does not matter whether transferor and transferee courts are involved: the "law of the case" applies to prior rulings of a coordinate transferor court. *Christianson*, 486 U.S. at 816. "Adherence to the law of the case principles is even more important . . . where the transferor judge and the transferee judge are not members of the same court. [T]he principles of comity among courts of the same level of the federal system provide a further reason why the transferee court should not independently re-examine an issue already decided by a court of equal authority." *Hayman Cash Register Co.*, 669 F.2d at 169. Furthermore, implied rulings by the transferor court are due the same respect and protection under the "law of the case" as are explicit rulings. *See Christianson*, 486 U.S. at 817 ("That the . . . [transferor court] did not explicate its rationale is irrelevant, for the law of the case turns on whether a court previously 'decide[d] upon a rule of law'— . . . not on whether, or how well, it explained the decision."). Therefore, by ordering remand, the North Carolina District Court violated its obligation to respect the prior decision of a coequal court from a different circuit. This Court should review this case to address the Fourth Circuit's sanctioning of divergence by one of its district courts from the accepted and usual course of judicial proceeding.

II. A COURT OTHER THAN THE ONE TO WHICH A CASE IS REMOVED LACKS POWER TO REMAND ON EQUITABLE GROUNDS PURSUANT TO 28 U.S.C. § 1452(b)

This case was removed to the federal court under 28 U.S.C. § 1452(a) and may be remanded on or for equitable grounds only under 28 U.S.C. § 1452(b). Unlike the remand in *Things Remembered, Inc. v. Petrarca*, No. 94-1530, 1995 WL 709623, 1995 U.S. LEXIS 8531 (U.S. Dec. 5, 1995), which was based on the untimeliness of removal, the remand in the present action was

based *exclusively* on equitable grounds. There were no jurisdictional defects in this action.

No case has been found applying 28 U.S.C. § 1452(b) to authorize a court other than the one to which a case was removed to remand that case on equitable grounds. Because § 1452(b) provides the only basis for a district court (to which a case is removed) to remand on equitable grounds (no provision in 28 U.S.C. § 1447(c) authorizes remand on equitable grounds), the statute itself, § 1452(b), provides the only authority on the matter.

The statute clearly and unequivocally states that "[*t*]*he court to which such claim or cause of action is removed* may remand such claim or cause of action on any equitable ground." 28 U.S.C. § 1452(b) (emphasis added). It is axiomatic that in construing federal statutes, one must assume that the ordinary meaning of the language that Congress employed accurately expresses legislative purpose. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985).

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (citations omitted).

Thus, there can be no question that, under 28 U.S.C. § 1452(b), only the court to which a case is removed may remand that case on equitable grounds. The language of § 1452(b) is unambiguous. There is no room for alternative formulations or interpretive nuance. This case was removed to the Texas District Court. In accordance with the express wording of the statute, that federal court is the only court with the power to remand this case on equitable grounds.

The congressional logic of the bankruptcy removal statute granting remand power on equitable grounds *only* to the court to which the case was removed is elegant. The removal court is in the same district as the state court from which the case is removed. The removal court is in the best position to assess the important equitable factors for remand such as the duplication or uneconomical use of judicial resources, comity, prejudice to involuntarily removed parties and the expertise of the court where the case originated. *See River Cement Co. v. Bangert Bros. Constr. Co.*, 852 F. Supp. 25, 27 (D. Colo. 1994) (citing *In re Finley*, 62 B.R. 361, 366 (Bankr. N.D. Ga. 1986)).

It cannot be seriously argued that a North Carolina district court has a deeper appreciation for these issues than the Texas court familiar with the Texas state court from which the case was removed. Even if reasonable minds could differ on the most effective means to address these important equitable issues under § 1452(b), Congress has foreclosed that debate. Congress has decided the issue in favor of providing authority over equitable remands under § 1452(b) *only* to the court to which the case was removed. In this case, that court was the Texas District Court, not the North Carolina District Court.

However, the North Carolina District Court in the present case, without even addressing or acknowledging the issue involved, simply assumed it had authority to remand on purported equitable grounds under 28 U.S.C. § 1452(b). The North Carolina District Court offered no basis for authority for the remand decision other than § 1452(b). Therefore, unless the North Carolina District Court derived its power under § 1452(b) to remand this case on equitable grounds, it exceeded its authority. Plainly the district court in North Carolina had no power to remand this case under § 1452(b). It was never the court to which the case was removed. It never had authority to issue a remand under § 1452(b). In ordering remand, the North Carolina District Court exceeded its authority.

The Fourth Circuit panel that denied the Petition for Writ of Mandamus must have assumed that the District Court had the authority to remand, and thus overlooked or failed to follow the express dictates of 28 U.S.C. § 1452(b). Petitioners acknowledge that other remand statutes provide the authority to remand in other situations. However, § 1452(b) is unique in imposing the limitation that it is "[t]he court to which such claim . . . is removed [that] may remand such claim . . . on any equitable ground." By not granting the Petition for Writ of Mandamus, the Fourth Circuit allowed the North Carolina District Court to exercise authority not granted to it by 28 U.S.C. § 1452(b).

III. MANDAMUS RELIEF WAS WARRANTED IN THIS CASE

In this case, the North Carolina District Court exceeded its authority by overruling the order of a coequal court and usurping the authority given by Congress exclusively to the Texas court to which this Texas state court action was removed. This is an extraordinary overreaching by a district court.

When no other adequate remedy is available, review of an improper or unauthorized order remanding a case must be by writ of mandamus. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 353 (1976); *Jamison v. Wiley*, 14 F.3d 222, 234 (4th Cir. 1994). This Court in *Thermtron* held that remand orders, because they are not "final judgment[s] reviewable by appeal" are properly reviewed by " 'mandamus to compel action, and not by writ of error to review what has been done'." *Thermtron*, 423 U.S. at 353 (quoting *Railroad Co. v. Wiswall*, 90 U.S. 507, 508 (1874)).

More recently, *Jamison* held that 28 U.S.C. § 1447(d) does not prevent in all instances the court from reviewing an order remanding an action to state court.

> On its face, § 1447(d) appears to preclude appellate review of all remand orders, regardless of basis. But

> as we all know, the Supreme Court has declined to give § 1447(d) such a literal meaning, holding instead that it insulates from review only those remand orders that are based on grounds specified in 28 U.S.C. § 1447(c).

Jamison, 14 F.3d at 231 (citing *Thermtron*).

The *Jamison* opinion rejected the claim that the remand at issue was "a remand order and nothing more" thus precluding review. *Id.* Moreover, the court in *Jamison* held that under the removal statute at issue, 28 U.S.C. § 1442(a)(1).

> . . . the district court had no right to decline to exercise jurisdiction over the removed action and its decision to do so was an error of sufficient magnitude to merit mandamus relief.

Jamison, 14 F.3d at 239. *See also Kolibash v. Committee on Legal Ethics of W. Va. Bar*, 872 F.2d 571, 573 (4th Cir. 1989) (recognizing that a district court has no authority to abstain from the exercise of mandatory jurisdiction on any ground other than specified by statute).

The common thread in the *Jamison* and *Kolibash* cases is that a district court may not exceed its authority in declining to exercise its mandatory jurisdiction over a removed action. The same principle, a court may not exceed its authority in making remand decisions, must apply when the court's decision to remand a case is outside its statutory authority. Such a decision exceeds its authority and must be subject to mandamus. *See Thermtron*, 423 U.S. at 351 ("Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d).").

The recently-decided *Things Remembered, Inc. v. Petrarca*, No. 94-1530, 1995 WL 709623, 1995 U.S. LEXIS 8531 (U.S. Dec. 5, 1995), does not prevent this

Court from reviewing the Fourth Circuit's refusal to rectify the North Carolina District Court's unauthorized exercise of the power to remand in the present case. *Things Remembered* is inapplicable here. The remand in *Things Remembered* was based on the untimeliness of removal, but the remand in the present action was based *exclusively* on equitable grounds by a court not authorized to consider such grounds. Therefore, unlike in *Things Remembered*, there are no procedural or jurisdictional defects in the present case. This case is analogous to *Thermtron* in that the remand decision was outside the power of the court. *See Things Remembered*, 1995 WL 709623, at *4, 1995 U.S. LEXIS 8531, at *11 (Kennedy, J., concurring) (noting the observation in *Thermtron* that "a remand order other than the orders specified in subsection (c) [of 28 U.S.C. § 1447] had 'no warrant in the law' and could be reviewed by mandamus").

The remand order in this case exceeded the authority of the North Carolina District Court under § 1452(b) and violated the principle of deference to the order of a coequal court. As long ago as 1934, the Fourth Circuit held that a district court may be ordered by mandamus to hear and decide a case that it had improperly ordered remanded to state court. *See Travelers' Protective Ass'n of America v. Smith*, 71 F.2d 511 (4th Cir. 1934).

Mandamus was the appropriate means to direct that the North Carolina District Court's Order and Memorandum Opinion be vacated and that the North Carolina District Court exercise jurisdiction to hear and determine this case. This Court should review the Fourth Circuit's denial of the Petition for Writ of Mandamus.

CONCLUSION

For the reasons stated herein, this Court should review this case in order to address the way in which the Fourth Circuit Court of Appeals has sanctioned the departure by one of its district courts from the accepted and usual course of judicial proceeding. As indicated by this Court's decision in *Celotex Corp. v. Edwards*, —— U.S. ——, 115 S. Ct. 1493 (1995), the issues raised by this petition are of recent concern to this Court. This Court should review this case to ensure that the principles of judicial proceeding announced in *Celotex* are observed by the district courts and enforced by the circuit courts of appeal.

Respectfully submitted,

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